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454607—42——1

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 1041

JAMES CARLISLE BASKIN, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 6–11) is not yet officially reported.

JURISDICTION

The judgment of the Court of Claims (R. 11) was entered on January 5, 1942. The petition for a writ of certiorari was filed March 14, 1942. The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended.

QUESTIONS PRESENTED

Petitioner was suspended from his position as a guard at a Federal penitentiary on a charge of "having written letters to officials of the Government criticizing the administration of prison affairs" and was subsequently discharged "for the good of the service." Twenty-one months after the discharge, petitioner sued in a District Court to recover the loss in salary, alleging that the suspension and discharge were illegal. The action was dismissed for want of jurisdiction and, sixteen months after the dismissal, petitioner instituted the present action in the Court of Claims to recover salary. The questions presented are:

1. Whether the action is barred by laches.
2. Whether petitioner's removal was lawful.

STATUTES INVOLVED

Section 6 of the Act of August 24, 1912, 37 Stat. 555, U. S. C., sec. 652, and Rule XII of the Civil Service Commission are set forth in the Appendix, infra, pp. 13–15.

STATEMENT

On August 1, 1941, petitioner filed a petition in the Court of Claims seeking to recover salary from January 15, 1936, on which date he was allegedly wrongfully dismissed from his position as guard at the United States Penitentiary at Lewis-

burg, Pennsylvania (R. 1–5). The facts, as stated in the petition, may be summarized as follows:

Petitioner, an honorably discharged soldier of the United States, was, from March 1, 1928, to about January 15, 1936, employed in the United States Prison Service, Department of Justice, having been appointed and classified after examination in accordance with regulations of the Civil Service Commission (R. 1).[1]

On September 3, 1935, while serving as a guard at the United States Penitentiary at Lewisburg, Pennsylvania, at an annual salary of $1,680.00, petitioner received a formal notice of suspension from the Warden (R. 1). The notice purported to be given pursuant to Rule XII of the Civil Service Commission, and the charge upon which the suspension was predicated was "having written letters to officials of the Government, criticizing the administration of prison affairs" (R. 1–2). Petitioner then filed a sworn reply to the charge stating that the letters were written

[1] As such a classified employee in the Civil Service, it is alleged that petitioner was entitled to the protection of Section 6 of the Act of August 24, 1912 (27 Stat. 555, 5 U. S. C., sec. 652) requiring that removals be only for cause and, as an honorably discharged soldier, that he was entitled to the protection of Title 5, Section 648 of the United States Code providing that in the event that the force in any executive department were reduced, no honorably discharged soldier whose rating is "good" shall be discharged or reduced in salary or rank.

by him in good faith and did not constitute a violation of Rule XII (R. 2). Petitioner was, nevertheless, suspended without a hearing and has never been permitted to resume his duties (R. 2).

On or about October 4, 1935, petitioner wrote a letter to the Director of the Bureau of Prisons expressing "his regret of the mistake he had made in criticizing the prison administration" (R. 2). In reply, he received a letter, dated October 8, 1935, from the Assistant Director of the Bureau in part as follows (R. 2):

> The Director has authorized me to say that he accepts your explanation of the transaction which resulted in your suspension, and that in connection with your efforts to secure a transfer he is willing to give you the best letter of recommendation he could consistently issue. I am enclosing a draft of the letter of recommendation he would be willing to give you.
>
> If you will send us your application for leave without pay, we will arrange to terminate your suspension, with the understanding that while you will be officially a part of the Prison Service, you do not report back for duty at Lewisburg, but retain the status of an employee on leave without pay pending your efforts to secure a transfer to some other branch of the service.

The enclosed letter of recommendation, subsequently signed by the Director, listed the various positions held by petitioner in the Prison Service,

and stated that "During this period of employment he has rendered faithful, conscientious service. Reports from his superior officers show him to be a competent employee" (R. 2–3).

In accordance with the suggestion contained in the Assistant Director's letter, petitioner applied, on October 11, 1935, for leave without pay, and on October 19, 1935, he received a letter from the Assistant Director confirming the arrangement and terminating the suspension (R. 3). The Assistant Director stated "We consider that the discipline administered Mr. Baskin through the medium of the suspension * * * is sufficient, * * *" (R. 3). Petitioner, being unable to secure a transfer, sought reinstatement as a prison guard, but was unsuccessful (R. 3). He consulted legal counsel, and in response to a request for information, his counsel was advised by letter of January 15, 1936, from the Assistant Director that petitioner's "time is up now, and his appointment is, therefore, being terminated for the good of the service" (R. 3).

Twenty-one months later, in September 1937, petitioner filed suit in the District Court of the United States for the Eastern District of South Carolina to recover his salary; the suit was dismissed on April 6, 1940, on the ground that the court was without jurisdiction of an action to recover the salary of a public officer (R. 4). Petitioner filed this action in the court below, in Au-

gust 1941, more than a year after the dismissal of the prior proceeding but as soon as he was able to obtain counsel (R. 4). The petitioner alleged a loss of salary from January 15, 1936, to the time of filing the petition, in the sum of $6,845.00, and prayed for judgment in that amount (R. 4–5).

On September 10, 1941, the United States filed a general traverse, but on September 24, 1941, with the approval of the court, the traverse was withdrawn and the Government filed a motion to dismiss "on the ground that said petition fails to set forth a cause of action within the jurisdiction of this Court" (R. 5). The motion to dismiss was sustained but on the ground that the petition failed to state a cause of action (R. 11).

ARGUMENT

In the court below, the Government urged in support of its motion to dismiss for lack of jurisdiction that petitioner's suit was one to try title to office and that in accordance with the decisions of the Court of Claims,[2] the suit should be dismissed for lack of jurisdiction. The court below, without expressly passing upon that contention, held that the petition did not state a cause of action in that petitioner had been properly sus-

[2] *Arant* v. *United States*, 55 C. Cls. 327, 338; *O'Neil* v. *United States*, 56 C. Cls. 89; *Richardson* v. *United States*, 64 C. Cls. 233; *Goodwin* v. *United States*, 76 C. Cls. 218, 223; *Barry* v. *United States*, 83 C. Cls. 413; *Curran* v. *United States*, 92 C. Cls. 66, 72–73.

pended and discharged by the proper Government officials in accordance with all statutory requirements and regulations of the Civil Service Commission (R. 9–10), and in that, in any event, petitioner was guilty of laches in asserting his claim (R. 10). The decision is correct and presents no question which warrants review by this Court.

1. An employee or officer of the United States who has been discharged must use diligence in asserting his right to the office or to the compensation attached to it. Failure to act diligently constitutes laches barring recovery. *Arant* v. *Lane*, 249 U. S. 367, 372; *Nicholas* v. *United States*, 257 U. S. 71, 76; *Norris* v. *United States*, 257 U. S. 77, 80–81. This is so because "Public policy requires that the Government shall be seasonably advised of the attitude of its officers and employees attempted to be displaced when they assert illegal removal or suspension as a basis for the recovery of the office or its emoluments" so that "proper action may be taken in the public interest." *Nicholas* v. *United States*, 257 U. S. 71, 76. Petitioner's contention (Pet. 28–30) that the doctrine of laches does not apply in an action in the Court of Claims because it is "strictly an equitable doctrine" (Pet. 29) is plainly mistaken. This Court has held that the doctrine and the underlying consideration of policy apply as well to actions in the Court of Claims to recover salary (*Nicholas* v. *United States*, 257 U. S. 71, 76; *Norris*

v. *United States*, 257 U. S. 77, 80–81) as to mandamus proceedings to recover the office. *Arant* v. *Lane*, 249 U. S. 367, 372.[3]

The delay in this case warrants the conclusion that the claim is barred by laches. The petition on its face shows that petitioner took no action for about twenty-one months after his discharge in September 1936, and did not institute this proceeding until sixteen months after the suit in the District Court was dismissed, five and one-half years after the discharge. The initial delay alone is more than that previously held by this Court to bar relief. *Arant* v. *Lane*, *supra*, at 372 (20 months); cf. *Norris* v. *United States*, *supra*, at 80 (11 months).

2. Even if seasonably filed, the claim is without merit. Section 6 of the Act of August 24, 1912, 37 Stat. 555, 5 U. S. C., sec. 652, provides that "no person in the classified civil service of the United States shall be removed therefrom except for such cause as will promote the efficiency of said service and for reasons given in writing, and the person whose removal is sought shall have notice of the same and of any charges preferred against him, and be furnished with a copy thereof, and also be

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[3] The doctrine has been uniformly applied in the Court of Claims. *Morse* v. *United States*, 59 C. Cls. 139, 155; *Richardson* v. *United States*, 64 C. Cls. 233, 235; *Goodwin* v. *United States*, 76 C. Cls. 218, 234–235; *Hart* v. *United States*, 91 C. Cls. 308, 311–312.

allowed a reasonable time for personally answering the same in writing." Section 6 specifically provides that no hearing or trial shall be required except in the discretion of the officer making the removal. Section 1 of Rule XII of the Civil Service Commission embodies these provisions. Petitioner's removal was in accord with the statute and regulations.

Petitioner was given proper notice of the reasons for his removal, and an opportunity to answer. The petition discloses on its face that on September 3, 1935, petitioner received a formal notice of suspension from the Warden stating the charges preferred against him (R. 1–2). There is no suggestion that the letters and the objectionable matter therein were not identified with sufficient particularity to permit of answer; on the contrary, the petitioner alleged that he promptly filed a sworn reply with respect to the "letters mentioned" in the charges (R. 1–2). In view of the agreement as to petitioner's status following the suspension, further notice at the time of the discharge on January 15, 1936, was not required. The contention (Pet. 7, 22–23) that there was no finding that the removal would "promote the efficiency of the service" in accordance with the statute is without merit. The statement in the letter of discharge (R. 3) that the termination of petitioner's employment was "for the good of the service" was manifestly under-

stood and intended as the equivalent of a finding in the language of the statute.[4] And the courts may not independently determine whether the matters in the "letters mentioned" contained false or otherwise objectionable material justifying the removal. The finding of the government officials may not be disturbed unless in contravention of some statutory prohibition. *Keim* v. *United States*, 177 U. S. 290; *Eberlein* v. *United States*, 257 U. S. 82; *Taylor* v. *Taft*, 24 App. D. C. 95, writ of error dismissed 203 U. S. 461; *Levine* v. *Farley*, 107 F. (2d) 186 (App. D. C.), certiorari denied 308 U. S. 622; *Medkirk* v. *United States*, 44 C. Cls. 469, 481.[5]

Petitioner's contention (Pet. 8–9) that the charge, on which the finding was presumably based, is insufficient in law because of the pro-

[4] The petition on its face shows that the original notice of suspension was given pursuant to Rule XII (R. 1) which embodies the requirements of Section 6, and the term "for the good of the service" employed in the letter of discharge was presumably understood and intended by the officials as the equivalent of the statutory standard.

[5] The fact that petitioner was an honorably discharged soldier does not prevent his dismissal for just cause. *Keim* v. *United States*, 177 U. S. 290, 294–295.

vision of Section 6 prohibiting interference with the right to petition Congress or furnish information to members thereof is unfounded. The provision in question has no application to communications to others than members of Congress. *Levine* v. *Farley*, 107 F. (2d) 186 (App. D. C.) certiorari denied 308 U. S. 622. The charge petitioner was charged with was having written letters to "officials of the Government" (R. 1–2). There is no allegation that the letters mentioned in the charge were addressed to Congressmen and, in view of the presumption of official regularity, the burden was on petitioner to show by affirmative allegation that the statute was violated.[6]

CONCLUSION

The decision below was correct. There is no conflict of decisions, and the case presents no question of importance requiring the decision of this

[6] Petitioner's contention, now raised for the first time in this Court (Pet. 12–13, 24–27), that the discharge was illegal because not made by the Attorney General, affords no basis for review. Nowhere in the allegations of the petition is there any suggestion that the Director of the Bureau of Prisons was without authority to remove petitioner, or that the petitioner was discharged without the direction or approval of the Attorney General. The court below apparently did not construe the petition as raising this question and did not discuss it in its opinion and proceeded on the view that petitioner claimed only to have been discharged for insufficient cause. The petitioner made no motion for rehearing or a new trial and did not ask leave to amend the petition.

Court. For the foregoing reasons, therefore, it is respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FAHY,
Solicitor General.
FRANCIS M. SHEA,
Assistant Attorney General.
MELVIN H. SIEGEL,
ELLIS LYONS,
Attorneys.

APRIL 1942.

APPENDIX

Section 6 of the Act of August 24, 1912, 37 Stat. 555, 5 U. S. C., sec. 652, provides as follows:

> SEC. 6. That no person in the classified civil service of the United States shall be removed therefrom except for such cause as will promote the efficiency of said service and for reasons given in writing, and the person whose removal is sought shall have notice of the same and of any charges preferred against him, and be furnished with a copy thereof, and also be allowed a reasonable time for personally answering the same in writing; and affidavits in support thereof; but no examination of witnesses nor any trial or hearing shall be required except in the discretion of the officer making the removal; and copies of charges, notice of hearing, answer, reasons for removal, and of the order of removal shall be made a part of the records of the proper department or office, as shall also the reasons for reduction in rank or compensation; and copies of the same shall be furnished to the person affected upon request, and the Civil Service Commission also shall, upon request, be furnished copies of the same: *Provided, however,* That membership in any society, association, club, or other form of organization of postal employees not affiliated with any outside organization imposing an obligation or duty upon them to engage in any strike, or proposing to assist them in any strike, against the United States, having for its objects, among other

things, improvements in the condition of labor of its members, including hours of labor and compensation therefor and leave of absence, by any person or groups of persons in said postal service, or the presenting by any such person or groups of persons of any grievance or grievances to the Congress or any Member thereof shall not constitute or be cause for reduction in rank or compensation or removal of such person or groups of persons from said service. The right of persons employed in the civil service of the United States, either individually or collectively, to petition Congress, or any Member thereof, or to furnish information to either House of Congress, or to any committee or member thereof, shall not be denied or interfered with.

Section 1 of Rule XII of the Civil Service Commission provides as follows:

REMOVALS AND REDUCTIONS

1. *Reasons to be furnished.*—No person in the classified service of the United States shall be removed therefrom except for such cause as will promote the efficiency of the service and for reasons given in writing, and the person whose removal is sought shall have notice of the same and of any charges preferred against him and be furnished with a copy thereof, and also be allowed a reasonable time for personally answering the same in writing; and affidavits in support thereof; but no examination of witnesses nor any trial or hearing shall be required except in the discretion of the officer making the removal; and copies of charges, notice of hearing, answer, rea-

sons for removal, and of the order of removal shall be made a part of the records of the proper department or office, as shall also the reasons for reduction in rank or compensation; and copies of the same shall be furnished to the person affected upon request, and the Commission also shall, upon request, be furnished copies of the same.

U. S. GOVERNMENT PRINTING OFFICE: 1943